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No. 01-94

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE HONORABLE BOB SCHAFFER, CONGRESSMAN,

Petitioner,

v.

PAUL H. O'NEILL, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY

I. Certiorari Should Be Granted Because The Secretary's Argument That Congressman Schaffer Has Not Suffered An Injury Sufficient For Article III Standing Is Inconsistent With This Court's Holding In *Meese v. Keene.*

A. This Court and several Circuit Courts have held that damage to reputation is sufficient for Article III standing.

The Secretary asserts that the Tenth Circuit was correct in holding that a threat of damage to Congressman Schaffer's reputation is not a cognizable injury sufficient for Article III standing because Congressman Schaffer's injury was not a "personal" or "individualized" injury. *Resp. Opp. at 10.* The Secretary's assertion is in direct conflict with this Court's holding in *Meese v. Keene,* 481 U.S. 465 (1987), and other Circuit Court's holdings in *Miller v. Moore,* 169 F.3d 1119 (8th Cir. 1999); *Irish Lesbian and Gay Organization v. Giuliani,* 143 F.3d 638 (2nd Cir. 1998); and *Riggs v. City of Albuquerque,* 916 F.2d 582 (10th Cir. 1990), *cert. denied,* 499 U.S. 976 (1991).

In *Meese,* this Court held that the threat of damage to California State Senator Keene's personal, political, and professional reputation, the threat to his ability to obtain re-election, and the threat to his ability to practice his profession, each constituted a cognizable injury for standing purposes. *Id.* at 473. Relying on *Meese,* the Eighth Circuit, in *Miller v. Moore,* 169 F.3d 1119, 1122 (8th Cir. 1999), held that harm to a State Senator's political career

and livelihood, including his chances of re-election, conferred standing to challenge a state constitutional amendment. Also relying on *Meese*, the Tenth Circuit, in *Riggs v. City of Albuquerque*, 916 F.2d 582, 585 (10th Cir. 1990), held that plaintiffs had standing where they alleged harm to their personal, political, and professional reputations. Finally, the Second Circuit, in *Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 638, 650 (2nd Cir. 1998), held that harm to an organization's reputation was sufficient to show standing.

Based on this Court's holding in *Meese* and other Circuit Courts' application of *Meese*, the threat of harm to Congressman Schaffer's personal, political, and professional reputation, as a result of his receipt of the unconstitutional COLAs, constitutes a cognizable injury sufficient to sustain Article III standing. The Tenth Circuit's holding in this case that "Congressman Schaffer has not alleged a sufficiently personal injury to establish standing" is inapposite to this Court's holding in *Meese* and numerous other Circuit Court decisions. Contrary to the Secretary's assertion, a live conflict exists between the Tenth Circuit and this Court as well as other Circuit Courts on the issue of whether damage to reputation is an injury in fact for Article III standing.

B. This Court has held that a party need not seek to avoid further injury to his reputation because the need to take such action constitutes cognizable injury.

The Secretary claims that the Tenth Circuit was correct in its conclusion that "Congressman Schaffer can

mitigate his injury by resorting to a self-help remedy – he can remit the portion of his pay he believes is unconstitutional to the Treasury." *Schaffer*, 240 F. 3d at 885. *See Resp. Opp. at 11.* Thus, the Secretary argues that, because Congressman Schaffer can mitigate his injury, he has not suffered a cognizable injury sufficient for Article III standing. *Resp. Opp. at 11-12.* In *Meese*, this Court specifically rejected the Secretary's argument.

In *Meese*, this Court held that "the need to take affirmative steps to avoid the risk of harm to reputation constitutes cognizable injury in the course of his communication with the public." *Meese*, 481 U.S. 475. Like Senator Keene in *Meese*, Congressman Schaffer "is not merely an undifferentiated bystander with claims indistinguishable from those of [others]; he would have to take affirmative steps . . . to prevent public formation of an association between [the unconstitutional pay raises he received] and his reputation." *Id.* at 476. Even if Congressman Schaffer were to take such affirmative steps to avoid the risk of harm to his reputation and return those unconstitutional COLAs to the United States government, this Court has held that the need to take those affirmative steps would still constitute a cognizable injury sufficient for Article III standing purposes.

In further attempting to prove that Congressman Schaffer lacked an injury in fact sufficient for Article III standing, the Secretary argues that "psychological" injury did not endow Congressman Schaffer with standing to sue. *Resp. Opp. at 12.* As explained previously, *Pet. at 12*, Congressman Schaffer is not relying on a "psychological" injury to provide him standing. Instead, Congressman

Schaffer's standing is based upon the fact that his personal, political, and professional reputation has been threatened to be damaged as a direct result of his receipt of the unconstitutional COLAs. Therefore, the Secretary's argument that Congressman Schaffer's "psychological" injury does not create an injury sufficient to confer standing is a red herring.

II. The District Of Columbia Circuit Court's Ruling In *Boehner* Has Not Been Superseded By This Court's Decision In *Raines*.

The Secretary asserts that although the District of Columbia Circuit ruled in *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994), that a Member of Congress did have standing to challenge the COLAs at issue in this case, that decision has been superseded by this Court's decision in *Raines*. *Resp. Opp. at 8*. The Secretary argues that the purported injury in *Raines* is the same injury suffered by Congressman Schaffer. *Resp. Opp. at 10*. The Secretary is wrong in his assertion because, in *Raines*, the Members of Congress did not have a personal stake in the alleged dispute, nor had they "been deprived of something to which they personally are entitled". *Raines v. Bryd*, 521 U.S. 811, 821 (1997).

In *Raines*, this Court did not address the situation in *Boehner*, where, as here, a Member of Congress suffered a personal, individualized injury directly affecting both his private interest as a government employee, as well as his personal, political and professional reputation. *See, Boehner*, 30 F.3d at 160-161. In fact, this Court made no mention of *Boehner* in the *Raines* decision. In *Raines*, Members of Congress did not have a personal stake in the

alleged dispute, but were, in this Court's view, merely objecting to the Line Item Veto Act because it represented a loss of political power by them. *Raines*, 521 U.S. at 821. In *Raines*, Members of Congress had suffered no individualized harm to pay or reputation, but rather complained of a generalized "institutional injury" as a result of their loss of a vote. *Id.* at 829. This Court pointed out that Members of Congress did not claim "that they have been deprived of something to which they personally are entitled." *Id.* at 821. In *Boehner*, then-Judge Ruth Bader Ginsburg, writing for the Circuit Court, held that Congressman Boehner's claim "that the Ethics Reform Act unconstitutionally interferes with the amount and timing of his pay is a straightforward challenge to the constitutionality of a public law that directly affects his private interest as a government employee." *Boehner*, 30 F.3d at 160.

Unlike the Members of Congress in *Raines*, but like the Members of Congress in *Boehner*, Congressman Schaffer claims that he has been "deprived of something to which [he] personally [is] entitled." That is, Congressman Schaffer's standing lies, as in *Meese* and *Boehner*, in the threat of harm to his reputation and the impact on the amount and timing of his pay. *Meese*, 481 U.S. at 475; *Boehner*, 30 F.3d at 160. While the institutional injury in *Raines* was "wholly abstract and widely dispersed", *Raines*, 521 U.S. at 829, Congressman Schaffer's injury is concrete and personal. Congressman Schaffer's "political career and livelihood is precisely the type of individualized, concrete injury that the Supreme Court found lacking in *Raines*." *Miller v. Moore*, 169 F. 3d 1119, 1123 (8th Cir. 1999).

Raines did not address, let alone supersede, the situation of the individualized harms presented here, in *Meese*, and in *Boehner*. The Tenth Circuit's reliance on *Raines* as its authority for rejecting *Boehner* and ignoring *Meese* is not only improper, it puts the holding of the Tenth Circuit in conflict with the decisions of this Court and the D.C. Circuit.

III. Certiorari Should Be Granted Because Congressman Schaffer's Injury Can Be Redressed By A Judgment Against The Secretary Of The Treasury.

The Secretary asserts that a judgment against the Secretary would not redress Congressman Schaffer's injury. *Resp. Opp. at 15*. This assertion is not true. Section 80 Title 2 provides:

> The moneys which have been, or may be, appropriated for the compensation and mileage of Members and Delegates shall be paid at the Treasury . . .

The Secretary's argument, that he has no role in the payment of Congressman Schaffer's salary, is completely false. *Resp. Opp. at 15*. Based on the plain meaning of the word "paid", it is clear that the Secretary has the ultimate authority over the payment to Congressman Schaffer. Furthermore, because the Secretary also has a duty to ensure against "fraud" or "loss" (31 U.S.C. § 321(a)(5)), he is the final arbiter as to whether Congressman Schaffer's check is properly drawn, that is, in compliance with the Constitution and federal law. An injunction, enjoining the Secretary from cashing paychecks that are drawn in conflict with the Twenty-Seventh Amendment will indeed

address Congressman Schaffer's injury. The Secretary's argument that the Secretary could do nothing to alleviate Congressman Schaffer's injury, if so ordered by a federal court, is untrue.

CONCLUSION

For these reasons, *certiorari* should be granted.

Respectfully submitted,

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